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No. 22678

United States
Court of Appeals
for the Ninth Circuit

PAUL EDWARD SIMON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Brief for Appellant

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of the District Court of Arizona entered on the 6th day of November, 1967 adjudging Appellant guilty as charged in the indictment filed February 11, 1967 on Counts II and II of said indictment and from the sentence imposed pursuant to the guilty verdicts returned by the jury in a trial which began on October 26, 1967.

The District Court had jurisdiction by virtue of an indictment returned by the Grand Jury charging violations of 21

U.S.C. 176 (a) and 18 U.S.C. 545. Upon the judgment, Appellant was sentenced to serve five (5) years on Count II and two (2) years on Count III of said indictment with the sentence on Count III to run concurrently with the sentence on Count II. The Notice of Appeal was filed on November 6, 1967.

This Court has jurisdiction to entertain this Appeal and to review the judgment in question under the provisions of Section 1291, Title 28, U.S. Code.

STATEMENT OF THE CASE

The defendant was convicted under Count II for violating 21 U.S.C. Sec. 176 (a) in that he imported "approximately twenty-four (24) pounds one and one-fourth (1¼) ounces of bulk and refined marihuana and one-fourth (¼) ounce of Hashish, contrary to law." He was also convicted under Count III of violating 18 U.S.C. Sec. 545 in that he imported "approximately seventy-two (72) amphetamine and barbiturate pills and approximately twenty-seven (27) tablets of Percodan, contrary to law, that is to say, without such amphetamine and barbituate pills and Percodan tablets having been invoiced and presented to any Customs Officer for inspection." Except for the twenty-four (24) pounds of marihuana, the other narcotics were *never* shown to be within the defendant's possession. The facts may be summarized as follows: When the defendant and his wife came from Mexico to the United States through the Inspection Station at Nogales, Arizona, agents discovered twenty-four pounds of marihuana in packages taped to the springs under the rear seat of the automobile in which defendant was driving. The evidence reasonably supported that conclusion. However, the Government *never* proved that the refined marihuana (Hashish) as well as the amphetamine, barbiturate and Percodan pills came from the automobile. Let us examine the relatively short transcript of the trial.

The prosecution made a brief opening statement of which the following is the only interesting portion:

"Customs agent Dennis was summed there and his attention was called to the burn. He asked if the public health doctor had been summoned. He hadn't come down yet. At any rate, within a few minutes, Dr. Philip Benton, public health doctor stationed there, came down. He had been with another patient. He came down and looked at Mrs. Simon's leg and said it would not be too painful or too dangerous to have them proceed with the booking order, making out fingerprint cards and then she should be taken to a doctor. At that point, *on the table* — the car was being searched by Mr. Eccleston—on the table was found a bag and in the bag were bottles of what the government will show were Percodan tablets, amphetamine tablets, hasish or refined marihuana resins, various articles like that." (emphasis added)

The key exhibits introduced by the Government were Exhibit 51, a bag containing the refined marihuana, Hasish and Percodan tablets; Exhibit 52, a bag containing the amphetamine tablets, and No. 53 a bag containing the amphetamine tablets which had been in Exhibit No. 52.

The Government's first witness was William Zimmerman, a quarantine inspector, who was stationed in Nogales, Arizona, on May 26, 1967 when the alleged crime occurred. R.T. (19). He testified that the two defendants entered from Mexico into the United States at the Grand Gate R.T. (19) in a 1954 Chevrolet Sedan R.T. (20). Mr. Simon was driving and Mrs. Simon was lying on the back seat R.T. (20). Mr. Zimmerman said:

"A. While I was examining the certificates, he was telling me his wife had burned her leg in Guayman, and he wanted a doctor or directions to a clinic. And he appeared excitable, and I informed him that it was necessary to stop at the secondary area for an inspection and then he could proceed.

What happened then, if anything?

Answer: Well, he went down to the secondary area. It was about 50 yards from the main gate, and he stopped there for inspection.

Did you take a declaration from him?

Answer: No, I did not. R.T. (20-21).

Approximately thirty minutes later (24) Mr. Zimmerman went to the secondary area, and was asked:

"Q. Did you see their car?

"A. It was outside the secondary.

"Q. Was anyone around their car?

"A. When I came down there, Mr. Pelmans and Eccleston were removing some packages from the seat that they took out of the car.

"Q. Did you see anything else removed?

"A. Well, I saw a package later that they said had to come from the car. I didn't see it taken out of the car.

"Q. Where was that package when you saw it?

"A. They said it had come from inside, up under the dashboard. I don't know where, but up under.

"Q. Where was this package when you saw it?

"A. It was on the table. We have a big table right along side the car there. R.T. (22-23).

On cross-examination, Mr. Zimmerman was asked:

"Q. You mentioned that someone said that brown package came from under the dashboard. Do you remember who said it, which officer?

"A. Most likely was Mr. Eccleston, because I think Mr. Pelmans was inside with Mrs. Simon. R.T. (24).

That is it. The Hashish and all of the pills allegedly came from the paper bag which Mr. Zimmerman discussed. However, the Government never proved that the bag came from the Defendant's automobile. Mr. Zimmerman did not search the car and did not see anyone remove the package containing the tablets.

The next witness for the Government was Uhl Plemans, a customs inspector who was working at the secondary area when the defendants went there. R.T. (25).

Mr. Plemans and Mr. Eccleston inspected the car by tilting up the back seat where they saw some packages taped to the springs R. T. (27-28).

The packages became the Government's Exhibits 1 through 24. Mr. Plemans was asked:

> "Q. After you found Government's Exhibits 1 through 24 for identification under the rear seat, what did you do?
>
> "A. Then I took the suspects into the secondary building, placed them under arrest, and advised them as to their rights, Constitutional right. R.T. (30-31-40).

It is important to note that there was a break between the discovery of the twenty-four pounds of marihuana which comprised Exhibits 1 through 24 and the alleged discovery of the refined marihuana, Hashish and various tablets contained in Exhibits 51, 52 and 53.

On cross examination, Mr. Plemans admitted that he did not personally find the contents of Exhibit 51 and did not know where they came from because he was inside the building with the defendants. (46). Finally he admitted that Government's Exhibit 53 which was a plastic jar found in Government's Exhibit 52 (50) was discovered by someone else, and he did not know where it came from. R.T. (51).

The Cross-examination was as follows:

> "Q. Mr. Plemans, talking about the items you identified in 52—in 51, the plastic bags, all those little items, the cardboard carton, small jar, where did you find those?
>
> "A. I didn't find those personally, another inspector found those.

"Q. Do you know where they came from? Could you see where they came from?

"A. I did not, no. I was inside with the suspects.

"Q. You of your own knowledge, don't know where they came from?

"A. Not for sure, no. R.T. (45-46).

The next witness was Francis Baker, a customs inspector (52) who did not see Exhibits 1 through 24 actually removed from the car (53) and did not know whether Exhibits 51 contained the same substance as Exhibits 1 through 24. R.T. (54) (53).

The next witness was John Dennis. He testified to the control of exhibits 1 through 24 which he sent to the customs chemists in California (65) as well as Exhibits 51 and 53. (66). On Cross-examination he was asked:

"Q. Mr. Dennis, it is a fact you never saw Exhibit 51 come out of the automobile?

"A. That is true, sir.

"Q. You never saw item 52, or the brown paper which was a bag, come out of the automobile?

"A. That is true, sir.

"Q. You never saw item 53, the pills, the bag that had the pills in it, come out of the automobile?

A. That is correct. R.T. (67).

The next witness was Everett Turner, a customs investigator (73), who exculpated Mrs. Simon. R.T. (75).

The next witness was Dr. Philip Benton who treated Mrs. Simon's burned leg. R. T. (80-81).

The next witness was Karl Vogt, the inspector who received Exhibits 1 through 24 from Mr. Dennis (89), but did not know whether he received Exhibit 51 (91). Exhibits 27 through 50 were samples prepared from Exhibits 1 through 24 (92-95), and he delivered them to the laboratory in California (95). He also received Exhibit 53, the tablets, from Mr. Dennis and sent them to the laboratory. R.T. (97).

The next witness was Rosalyn Ereneta, the chemist who identified the contents of Exhibits 25 through 50 as Marihuana (98, 109). *Over objection,* she identified the contents of Exhibit 51 as hashish, marihuana and Percodan (111-113). They were admitted into evidence. *Over objection,* she identified the contents of Exhibit 53 as amphetamine pills (114). These were also admitted into evidence.

The State then dismissed as to Mrs. Simon and rested, whereupon Mr. Soble moved for acquittal, basis of insufficient evidence R.T. (117) and on the ground that 21 U.S.C. Sec. 176(a) is unconstitutional because it forces a person to incriminate himself contrary to the guarantee of the Fifth amendment R.T. (118). The motion was denied. Mr. Simon took the stand and, if believed, totally exculpated himself from any wrong-doing or knowledge of the narcotics in the automobile.

SPECIFICATIONS OF ERROR RELIED UPON

Specification of Error No. 1

That the trial court erred in failing to grant the motion for acquittal as to Count III of the indictment at the close of the government's case on account of the fact insufficient evidence was produced to support Count III.

Specification of Error No. 2

That the trial court erred in failing to grant the motion for acquittal as to Count II of the indictment on the grounds that Count II of the indictment violates the constitutional privilege against self-incrimination as guaranteed under the Fifth Amendment.

QUESTIONS PRESENTED

1. Whether the verdict of guilt on Count III is contrary to the weight of the evidence, since the only evidence offered by the Government was to prove that th narcotics were seen on a table next to the defendant's automobile.

2. Whether the privilege against self-incrimination properly invoked, is a complete defense to prosecutions under 21 U.S.C. Sec. 176 (a) and 18 U.S.C. Sec. 545.

ARGUMENT

Question 1 — Specification of Error

The defendant could not be found guilty of possessing amphetamine and Percodan tablets when the only evidence to support possession was that the tablets were found on a table next to the defendant's automobile approximately ten minutes after the automobile was searched.

Decisions regarding the definition of "possession" are unnecessary. We will all agree that constructive possession will support a conviction and constructive possession may be established by proving that the narcotics were found in an automobile driven by defendant. However, the government must prove beyond a reasonable doubt that the particular narcotics in question were actually in the defendant's automobile. The government has failed. Analytically, the problem is whether an inference—reasonable in nature, has been established to tie together the automobile and the bag containing the tablets. We contend the inference is not reasonable because it is based entirely upon the heresay recollection of Officer Zimmerman. Someone told him the "package" had come from the automobile.

Officer Plemans' testimony is even weaker. He helped search the rear seat of the car. Then he and the defendants left. The bag containing the tablets later appeared on a table. Mr. Premans didn't know where the bag came from.

From this meagre testimony, not worthy to be called evidence, it would be pure speculation to conclude that the government "proved" the tablets had been "possessed" by the defendant. Therefore, the conviction under Count III must be reversed.

Question 2 — Specification of error

That the trial court erred in failing to grant the motion for acquittal as to Count II of the indictment on the grounds that Count II of the indictment violates the constituional privilege against self-incrimination as guaranteed under the Fifth Amendment.

21 U.S.C. Sec. 176(a) and 18 U.S.C. Sec. 545 are part of an inter-related statutory scheme designed to elicit information from persons in possession of narcotics, and the privilege against self-incrimination properly invoked, is a complete defense to prosecutions unders the afore-mentioned statutes.

In *Marchetti v. United States,* ....., U.S. ....., 88 S. Ct. ..... 19 L.Ed. 2d 889, the defendant successfully challenged convictions for violating 26 U.S.C. 4411 and 4412 in that he failed to register and to pay an occuptional tax for engaging in the business of accepting wagers and for conspiring to evade payment of the tax. On appeal, he argued that the statutory obligation to register and to pay the occupational tax violated his constitutional privilege against self-incrimination. The United States Supreme Court agreed and reversed the convictions. The Court said that 26 U.S.C. Sec. 4411 and Sec. 4412 are part of an inter-related statutory system for taxing wagers. Those who wager must pay excise taxes and occupational taxes. They must register annually with the Director of Internal Revenue District and submit detailed forms and registration applications. They must post revenue stamps and preserve daily records of their wagering business and permit inspection of their books of account. Payment of the wagering taxes does not exempt any person from any penalty for wagering, and all of the information which they are required to provide is made available to Federal, State and Local prosecuting officers.

The Court said that the issue was not whether the United States could tax activities declared unlawful. Rather, the issue was whether the methods employed by Congress in the wagering tax

statutes were consistent with the privilege against self-incrimination guaranteed by the Fifth Amendment.

The Court reasoned that wagering is widely prohibited, therefore, the registration and occupational tax statutes created a real and appreciable hazard of self-incrimination because the information gathered pursuant to these provisions was made available for and used in prosecutions. The Court went on to reject the argument that the registration and occupational tax requirements did not infringe the constitutional privilege because they did not compel self-incrimination, but merely imposed on the gambler the initial choice of whether he should begin gambling in the first place. The Court said:

> "We find this reasoning no longer persuasive. The question is not whether petitioner holds a 'right' to violate state law, but whether having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 19 L.Ed. 2d at p. 899.

The Court held that the privilege against self-incrimination provided a complete defense to both the substantive counts for failure to register and to pay the occupational tax and the count for conspiracy to evade payment of the tax.

Chief Justice Warren wrote a single dissent for the Marchetti case, its companion case of *Grosso v. United States,* ..... U.S....., 88 S Ct. ....., 19 L.Ed. 2d 923, which held that the privilege against self-incrimination provided a complete defense to any prosecution under 20 U.S.C. Sec. 5841 or Sec. 5851 dealing with the failure to register a firearm and the possession of an unregistered firearm. Of particular interest in the

dissent of the Chief Justice is his conclusion that the majority decisions would invalidate a number of federal registration statutes including 26 U.S.C. Sec. 4722 concerning those who engage in narcotic drugs, and 26 U.S.C. Sec. 4753 concerning those who deal in marihuana, as well as the occupational tax provisions of Sec. 4721, 4702 (a) (2) (C) and Sec. 4751, all of which deal with narcotics. Chief Justice Warren also noted that 18 U.S.C. Sec. 1407 which requires narcotics addicts and violators to register whenever they enter or leave the country would also come under attack. Thus, it is clear that the majority opinions unquestionable control our particular case and prevent convictions under 18 U.S.C. Sec. 545 and 21 U.S.C. Sec. 176(a) when the privilege against self-incrimination is raised.

The decision in *Haynes v. United States,* Supra, is more closely related to our case because it dealt with a "possession" offense. The petitioner was charged with violating 26 U.S.C. Sec. 5851 for possessing an unregistered firearm as required by 26 U.S.C. Sec. 5841. He moved to dismiss on the ground that Sec. 5851 violated his privilege against self-incrimination, the motion was denied and he thereupon entered a plea of guilty.

On appeal, the United States Supreme Court pointed out that Sec. 5851 formed part of the National Firearms Act, an interrelated statutory system for the taxation of certain classes of firearms. Various provisions require the registration of firearms and the payment of occupational taxes. There are comprehensive provisions calculated to assure the collection of the tax and every person in possession of such a firearm was obliged to register. As in the case of 18 U.S.C. Sec. 545 and 21 U.S.C. Sec. 176(a) which defendant Simon allegedly violated, mere possession is sufficient to authorize conviction under 26 U.S.C. Sec. 5851 unless the possession is explained to the satisfaction of the jury.

The Court said that the issue was not whether Congress could regulate the manufacture, transfer or possession of firearms, nor whether Congress could tax unlawful activities. Rather, the issue

was whether enforcement of 26 U.S.C. Sec. 5851 was constitutionally permissible in view of the petitioner's assertion of the privilege against self-incrimination. The registration requirements were directed principally at those persons who obtained possession of a firearm without complying with the Act's other requirements and who would therefore be immediately threatened by criminal prosecutions under Sec. 5851 and Sec. 5861. On the other hand, registration of a firearm substantially increased the likelihood of prosecution under other provisions. Thus, the hazards of registration were real and appreciable as were the hazards of not registering. The conviction, though based upon the petitioner's guilty plea, was reversed.

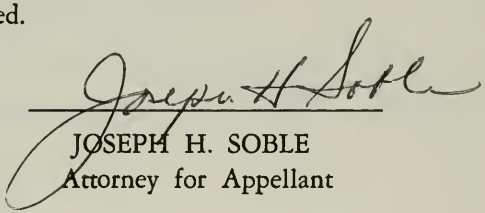
In the instant case, the defendant was convicted of violating 21 U.S.C. Sec. 176(a) which prohibits the importation of marihuana "contrary to law" and prohibits the smuggling into the United States of marihuana which should have been invoiced. He was also convicted of violating 18 U.S.C. Sec. 545 prohibiting the smuggling or importation of any merchandise "contrary to law" or which should have been invoiced. In both cases, possession without satisfactory explanation will authorize a conviction. Both sections are intimately related to the entire regulatory scheme for the control of marihuana. 26 U.S.C. Sec. 4701 et seq contains 120 pages of legislation designed to obtain information concerning those who deal in marihuana and there is additional legislation contained in Title 21 U.S.C.

If the privilege against self-incrimination provides a complete defense to prosecution under the wagering and firearms statutes, it must also provide a complete defense to prosecution under the narcotics statutes. The privilege was properly invoked and the convictions must be reversed.

CONCLUSION

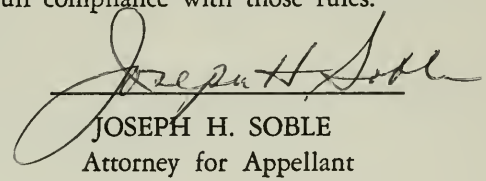
It is respectfully urged and submitted that the conviction of Appellant be reversed, the sentence be vacated and that Appellant be acquitted.

Respectfully submitted.



JOSEPH H. SOBLE
Attorney for Appellant

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing Brief is in full compliance with those rules.



JOSEPH H. SOBLE
Attorney for Appellant

STATE OF ARIZONA }
County of Pima } ss.

JOSEPH H. SOBLE, being first duly sworn, deposes and says:

That I mailed to the United States Attorney, JO ANN DIAMOS, at Federal Building, Tucson, Arizona this 15 day of April, 1968, three (3) copies of the within Brief.

Joseph H. Soble

JOSEPH H. SOBLE

SUBSCRIBED AND SWORN to before me, this 15 day of April, 1968.

Notary Public

My Commission Expires:

12-9-68

Sarah E. Miles